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RESTITUTION OR UNJUST ENRICHMENT.

IN the November number of Volume X. of this Review, Mr. Abbot criticises Professor Keener's book on Quasi-Contracts, and among other matters he finds the principle of "unjust enrichment" either a *petitio principii*, or "a redundant link in the chain of reasoning."[1] His reasoning is that since all unjust acts are not illegal, the term "unjust enrichment," by failing to give the rule of discrimination between unjust and illegal acts and those which are unjust and legal, is no rule at all. This would undoubtedly be true if it were admitted that all acts by which a man was unjustly enriched did not result in an obligation upon him to restore the value of his enrichment. But if that is not admitted, but on the contrary is denied, the logical difficulty with the definition disappears.

Does the principle then become redundant? I think not. The trouble in this case is, as I understand it, that, by reference to the standard of conscience in the legal definition, that standard becomes the "logically anterior principle," and the definition "incapable of a real application as a principle of jurisprudence."[2] But reference to a logically anterior principle is, as it seems to me, merely a logical necessity for any form of thought. Take any general proposition that you will, legal or lay, and a very slight analysis will show you that it is merely a reference to logically anterior concepts which are the real basis of any decision under the proposition in question. For example, the proposition that mutual promises create mutual obligations, is a reference merely to the concept of promises which is the real basis of decision in any given case as to the existence of an obligation. It can make no difference that in that case the concept of a promise is more easily grasped than that of injustice. That may be a reason of refusing to recognize the rule of "unjust enrichment" as a legal rule at all, but if so, it is a reason of policy, not of logic. In short, I think that all legal propositions simply consist in the reference of legal rights to certain concepts or standards which are determined without reference to legal facts at all, and that whatever faults a legal proposition may have, it is logically

[1] Page 226. [2] Page 225.

perfect so long as it does not so refer to legal concepts which cannot themselves be referred to lay concepts.[1]

But, further, I believe that reference to indefinite standards, such as that of conscience, is a common characteristic of legal rules. Take, for example, the rule of responsibility for unlawful acts, that none of their results create legal liability except those against which an ordinarily prudent man would have provided under the same circumstances. Surely the standard of what such results are in any given case is quite as incapable of precise definition as that of what acts are unjust.

Or consider the rule governing the extent to which one man may injure the property of another in the enjoyment of his own. *Sic utere tuo ut alienum non lædas.* The standard is really no other than that by which the interference of each with the enjoyment of his neighbors, balanced with his own enjoyment, results in the maximum of freedom, a rule quite as incapable of clear definition as that of injustice.

Moreover the whole jurisdiction of equity, albeit it is in many instances well defined at present, arose from and is being constantly based upon no concept more definite than that of the unconscientious conduct of men in the exercise of their legal rights.

I cannot think therefore that Mr. Abbot's criticisms are valid upon Professor Keener's theory in this regard. Whether that theory is borne out altogether by the cases, particularly in all its scope, is quite a different matter, and one which I cannot discuss here.

In the March number of the same volume of the Review, Mr. Abbot suggests as a substitute for Professor Keener's definition this: that the cases of so called unjust enrichment are all instances of the right of restitution upon the breach of a consensual obligation or upon a tort. I am not quite certain that he means the right of restitution to be a remedy, but I think he does, since he discusses it under the head of remedies and puts it among a schedule of remedies. The right itself is no more than the right of a plaintiff to be put in a position as good as that in which he was before the obligation or the tort.

The most important class of cases which will not fit such a definition are those of money paid under a mistake. Mr. Abbot calls

[1] Of course a legal proposition may itself be reducible to other legal terms requiring themselves reference to terms, etc., until we reach purely lay concepts; hence it is only mediately that we can say that all legal principles refer to such concepts.

them instances of the breach of a consensual obligation to tell the truth,[1] and instances the action of deceit as an example of the remedy of damages upon the breach of that obligation.[2] The difficulty with the action of deceit for this purpose is, however, that it will not lie unless the defendant has been guilty of a conscious misstatement,[3] and under no circumstances for mere suppression of the truth, unless there is, in the words of Lord Cairns, "such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false."[4] But obviously, if damages are not given through the whole range of this supposititious obligation, and yet there is no reason from the nature of the remedy why they should not be given, it is only fair to assume that, if they are given upon any obligation at all (which I cannot for an instant allow), that obligation is itself limited by the condition upon which the remedy actually is granted. Such would be an obligation not to lie, and that will not serve for the cases of money paid under a mistake.

Nor can I find the necessary elements from which to deduce such an obligation from the facts in the cases of money paid under a mistake. The only undertaking possible under the circumstances would be a warranty that the facts are as the parties state them to be. Obviously one cannot promise that an existing fact is so, since a promise means an assurance that the promisor shall perform something. The only promise which the facts admit, therefore, is that, if the facts be not as they are stated, the man who makes the statement will put the other party to the negotiation *in statu quo*, which is simply a warranty of the truth of the statement.

Suppose that A. comes to B. and reminds him that he has executed to B. a mortgage long ago, which he says that he now wishes to pay. B. supposes that the bond has been cancelled before, and tells A. that he so understands it; but, learning from A. the contrary, and believing A.'s recollection to be true, he insists upon payment before giving a satisfaction of the mortgage.

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[1] Pages 508, 509.

[2] Page 508.

[3] Ormrod *v.* Huth, 14 M. & W. 651 (1845) Ex. Ch.; Arkwright *v.* Newbold, 17 Ch. D. 301 (1881), C. A.; Redgrave *v.* Hurd, 20 Ch. D. 1 (1881), C. A.; Joliffe *v.* Baker, 11 Q. B. D. 255 (1883); Derry *v.* Peek, 14 App. Cas. 337 (1889); Glasier *v.* Rolls, 42 Ch. D. 436 (1889), C. A.; Angus *v.* Clifford, '91, 2 Ch. D. 449 C. A.; Morgan *v.* Skiddy, 62 N. Y. 319 (1875); Kountze *v.* Kennedy, 147 N. Y. 124 (1895); Bowker *v.* Delong, 141 Mass. 315 (1886).

[4] Peek *v.* Gurney, L. R. 6 H. of L. 377 (1873).

Afterwards the bond turns up cancelled, as B. supposed, and A. sues for money paid under a mistake. Surely it would be the height of absurdity to say that it is B. who has represented to A. a fact which is untrue. B. has simply accepted the money because of his belief in A.'s better memory of the facts. Clearly a theory involving the breach of a consensual obligation will not fit all the cases of money paid under a mistake.

But there is a worse difficulty. Suppose B. really had made the representation to A., and not A. to B. Does B. undertake to make A. whole, if A. takes his version of the story? We should all admit that he ought to make him whole, but does he actually mean to express that undertaking to A.? Both are supposed to believe the facts to be as B. states them, because only then is there a mutual mistake. Doubtless B. does mean, as Mr. Abbot says, that A. shall believe him to be telling the truth, but we must find an undertaking upon B.'s part to answer in case of his mistake, and the two things are very far from coincident. Is it not true, rather, that just in proportion as two men are really mistaken about facts, they do not think at all about the contingency of their error? It is only as they are in doubt that they provide for that; and in proportion as they are in doubt they are not mistaken, and if they are not mistaken the action will not lie for money paid under a mistake. Therefore we cannot say that there is that tacit understanding. The pity of it is that they do not think about the necessity of such an agreement at all. They might make such an agreement, but as a fact they do not. The case of a householder ordering supplies from a grocer, mentioned by Mr. Abbot, is quite different. The future payment of the householder is in the minds of both, else the grocer would not give up his goods or the householder would clear out the shop.

Another class of cases to which the "restitution theory" will not apply is that in which the defendant has received some of the consideration upon an illegal contract which he repudiates.[1] There is no obligation created by the agreement, so there can be no breach. In the same category are those cases where a defendant repudiates a voidable obligation; as where he was a minor or drunk or insane when he made it; or when it is the contract of a married woman under the old law; or where the contract was made in the name of one as principal by another acting as his agent, when

[1] Keener on Quasi-Contracts, p. 267 *et seq.*

in fact he was not.[1] In all these cases it may be said that there was a real obligation, which was conditional upon ratification, — many will, of course, be offended at my grouping the last instance with the rest in this connection, — but it must be remembered that a conditional obligation before the condition happens can be broken no more than if it were no obligation at all. Hence in these cases there can be no obligation broken before ratification, though it is, of course only in lack of ratification that the action in quasi-contract will lie.

Again, consider a contract within the Statute of Frauds. If the right of restitution be a remedy upon the obligation, it violates the statute, since it is then "an action upon the contract."

Still, again, take the cases in this country where one who fails in the performance of a contract, because it has become impossible, is allowed to recover what he has advanced, though the defendant be in no default.[2] It is true that it might here be urged that the defendant, having promised to perform, is in default really, though he has an excuse, so far as concerns the remedy of damages, in the prior default of the plaintiff, and that it is upon the defendant's actual default that the action is brought. This explanation falls to the ground, however, whenever the plaintiff's performance is an actual and not an implied condition to the defendant's performance. As the law has become actually settled, implied conditions are regarded as conditions in fact, though it is hard to see how they can be truly so regarded; and at all events no such distinction as is necessary under the argument suggested has been taken, and relief is granted in these cases without consideration of whether the plaintiff's performance was an actual or an implied condition to that of the defendant. In these cases it is the breach, not the obligation, that is lacking.

Finally, under the head of obligations, consider the case of subrogation, taken in its widest meaning. Suppose we should define it as a case where A., who has discharged an obligation of B. to a third person, is allowed to sue B. upon that obligation, though there was no obligation between A. and B. prior to the payment. It is of course the last fact which is important in the "restitution theory." Consider first the case where A. pays the burial expenses of one whom it is B.'s duty to bury, and is permitted to charge B. for them, though he paid them in B.'s absence and with-

[1] Keener on Quasi-Contracts, pp. 326–340.

[2] Ibid. p. 241 *et seq.*

out his request.[1] Again, consider the case where A. pays for the support of one whom it is B.'s public duty to support, a duty in which he fails, and where he may recover regardless of any contract upon B.'s part. No one will venture to suggest that A. in these cases sues as a member of the public towards whom the duty runs; he could then only prove his actual damages, and would add nothing to his rights by his payment. Such also is the case where B. has contracted to support a person, and A. discharges the duty in which B. fails.[2] Another instance is that of contribution between joint tortfeasors wherever that is allowed.[3]

Now in none of these cases is there any color of contract between the plaintiff and the defendant; hence I can see no escape from admitting them — if they are admitted at all — as exceptions to the "restitution theory" whenever an action at law is allowed concurrently with a bill in equity of subrogation proper.

Coming then to contribution between sureties, can we say of that as well that it is not dependent upon any contract between the sureties to make contribution to one another, since, if it is so dependent, it is only an instance of the remedy of damages upon that contract, as Mr. Abbot contends? The case of Deering *v.* Winchelsea[4] is, it seems to be conceded, one where contribution cannot be based upon any contract between the sureties, and therefore one where the "restitution theory" will not apply. It was a case where contribution was allowed between sureties for the same principal, when they had executed different instruments and at different times. Mr. Abbot meets the case by doubting its correctness, but in this I think he will admit himself in error, if he will consult the authority which now supports the doctrine.[5] But if this doctrine of contribution between sureties be correct, and if

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[1] Keener on Quasi-Contracts, p. 341 *et seq.*

[2] Professor Keener (p. 351), it is true, confines the remedy in this case to subrogation in equity, but as there is no more trouble upon the common counts in this case than in that of the discharge of a public duty, the only objection to the action at law seems to me to disappear.

[3] Keener, pp. 408, 410.

[4] 2 B. & P. 270.

[5] Mayhew *v.* Crickett, 2 Swanst. 185; Whiting *v.* Burke, L. R. 10 Eq. 539, and s. c. on appeal, 6 Ch. App. 342; Stirling *v.* Forrester, 3 Bligh, 575; Ramskill *v.* Edwards, 31 Ch. D. 100 (*semble*); Craythorne *v.* Swinburne, 14 Vesey, 160 (*dictum*); Duncan *v.* N. & S. Wales Bank, 6 App. Cas. at p. 19 (*dictum*); Norton *v.* Coons, 6 N. Y. 33; Armitage *v.* Pulver, 37 N. Y. 494; Chaffee *v.* Jones, 19 Pick. 260; Monson *v.* Drakely, 40 Conn. 552; Mills *v.* Hyde, 19 Vt. at p. 64 (*dictum*); Campbell *v.* Mesier, 4 Johns. Ch. at p. 338 (*dictum*). I have made no effort to make an exhaustive collection.

the reasoning by which the judges deduce the doctrine be correct, i. e. that contribution is in all cases a right of merely equitable basis and independent of contract between the sureties, then we have another exception whenever the remedy in equity is supplanted by an action at law.

So much for the cases in which there seems to be no breach of consensual obligation. How is it when the defendant has derived some advantage from the plaintiff by some act of his own, and not because it was given him freely? There are the well recognized cases of actions to recover the value of what one may have gained by an admitted tort; these we may pass, as they clearly do belong in the "restitution theory." But there are others which do not seem to fall in line. Take, for example, the case of money paid to satisfy a judgment which is afterwards reversed.[1] Suppose — to put the strongest case for a tort — the judgment creditor has actually levied or threatened to levy an execution. There is no wrongful act in any case; he has a perfect obligation which he does right to enforce, the only trouble being that, if he waited, that obligation would, as it afterwards turns out, become invalid. That does not make the past execution in any sense illegal, however; the defendant now simply holds what he has wrongfully, *ex æquo et bono;* that is the whole story.

Those cases in which an action is allowed for money extorted under threats to commit some tort at least are doubtful in our connection. The threat to commit a tort is not necessarily itself a tort. Suppose A. threatens to convert B.'s goods, and B. seeing no way to prevent the act and knowing that his remedy at law will be ineffectual, sells at a sacrifice. Or suppose that A. threatens B. wrongfully with imprisonment, A. being a sheriff, and B. leaves the county for a time and his business suffers. Or suppose that A. threatens to induce B.'s workmen to leave him, and A. refuses large contracts from fear of the threat. Suppose in each case B. acted as every prudent man would act who sought to avoid loss. Will it be insisted that A. is responsible in damages for the loss? Perhaps he is; the field of torts is an indefinite one, and constantly widening to-day, but he would be a bold man who could say with certainty that such an action does lie. But the action for money had is unquestionable, if under the threat A. extorts money from B.[2] Moreover, it is not in the judges'

[1] Keener, p. 417 *et seq.*

[2] Ibid., Chapter XI.

minds an action upon a tort at all. We must conclude, therefore, that these cases of duress are not instances of restitution for a tort.

All these are instances of exceptions to the theory suggested by Mr. Abbot; but there is another objection which goes to the definition itself, so far as concerns the cases where money paid or the value of goods or services rendered is recovered, because the defendant refuses to perform a valid obligation by virtue of which he obtained the benefit. Mr. Abbot's theory regards these cases as instances of a remedy upon such obligations. But this cannot be supported, I conceive. A remedy is an obligation destined to stand in the place of the plaintiff's rights, and be, as nearly as possible, an equivalent to him for his rights. Wherever the plaintiff has the right to the performance of some act by the defendant, that only can be a remedy to him for the defendant's failure to perform which is an equivalent to such a performance. But, obviously, to replace the plaintiff in his position before the defendant incurred his obligation is no equivalent to the plaintiff for the performance to which he had a right. It is not his former position which should be restored, but his future position which should be realized. It is only when the infraction of the plaintiff's right consists in a change from his former position that restitution can be a remedy, that is, when there has been a tort or the breach of a negative obligation; but where the infraction consists in a failure to act at all, the only remedy possible is a change in the plaintiff's former position, not a renewal of it.

Moreover, it seems to me that even were the "restitution theory" not intended as a doctrine of remedies at all, but merely as a rule that the right of restitution is given upon the breach of a consensual obligation, it cannot be supported without modification. The breach of such an obligation does not *ipso facto* give the right of restitution or rescission. It is only when the breach is so important as to make further continuance in the contract inequitable, that the other party is permitted to rescind the transaction and recover what he has advanced.[1] Where it is not, he must continue in his performance, and sue for damages upon the breach that has occurred, giving the defendant opportunity to fulfil his contract for the rest. The question is really quite the same as that which comes up in the case of so called implied

[1] Keener, pp. 303, 304.

conditions to a contract containing mutual obligations. Is it fair that one party should be compelled to go on and be content with his remedy for the breach of obligation by the other party, or is it fairer that, because of the breach already occasioned by the other party, he should be excused? That is a question which has been gradually settled by the rule that breaches going to the essence do excuse, others do not. Therefore, if the restitution theory be admitted at all of consensual obligations, it can be only with this modification, and it involves essentially equitable considerations. But it is only as the theory avoids the necessity of such considerations that it has its great merit as a theory; consequently this would seem to be a serious criticism, if it be a correct one, upon its application.

My conclusion is this: that Professor Keener's principle is logically perfect and of a kind far from anomalous; that the "restitution theory" will not apply to those instances of "quasi-contract," which are many, where there is either no obligation broken or no tort; that in the case of positive consensual obligations restitution cannot be regarded as a remedy at all; that in the case of all obligations, positive and negative, it does not follow *simpliciter* upon the breach, but only when special circumstances make it equitable that it should be given; and, in short, that it is only in the case of admitted torts that the theory has any application.

In the cases I have chosen as examples in what has been said, I have tried to illustrate only such rules as are well settled in one or more jurisdictions. There are several cases mentioned in Professor Keener's book which well illustrate the fact that quasi-contract is not a matter of consensual obligation at all, and which I have omitted; but the validity of such decisions might be questioned, and their discussion would take more space than their authority would add weight to my argument.

Mr. Abbot's theory I could wish were the law, because it is clear, precise, and manageable, but of course that is a very different question from whether it actually is the law. I am inclined to believe that it is not.

Learned Hand.